

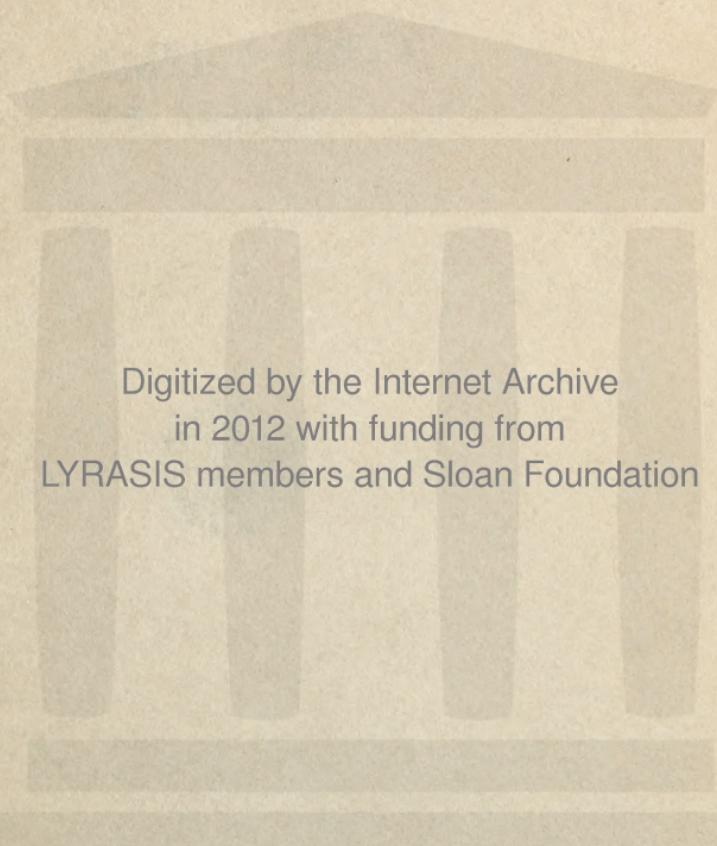
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THE ENLARGEMENT OF FEDERAL POWERS.

By

James Jefferson Britt

A faint, watermark-like illustration of a classical building's facade. It features a series of four columns supporting a triangular pediment. The building is rendered in a light, muted color, blending with the background.

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The Enlargement of Federal Powers; or, the Relation of the States and the Nation.

By JAMES J. BRITT,
of the Asheville Bar.



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A Paper Read Before the Pen and Plate Club, at Battery Park Hotel, Asheville, N. C., on Thursday Evening May 9, 1907.

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The Enlargement of Federal Powers; or, the Relation of the States and the Nation.

We live under a dual government. Our system is unique, exceptional, with nowhere a counterpart. It had no exact prototype, nor has it now anywhere a perfect fac-simile. We live under two flags, we yield two loyalties, we owe double allegiance, and are moved by two patriotisms. Yet we are a single people, with one hope, with like purpose, and with a common destiny.

I am not unmindful of the fact that I am about to attempt the discussion, from a viewpoint somewhat unusual, of a theme that has sharply divided, aye, violently rent, the best thought and heart and courage of the Republic from the day of Hamilton and Jefferson to the day of Roosevelt and Bryan. Yet, I enter upon the task freely, without trepidation, with no fears, save those born of a sense of inability wisely to conceive or aptly to express the advanced position I have taken. For my auditors are reasoning men, with passion and prejudice absent, with understandings enlightened, and consciences quickened, and whether we agree or disagree it matters little, for we all have our faces onward, with our eyes toward the light. Hence, I have allowed nothing to fetter my pen, nought to stifle my convictions, hating, as I do, the coward, and hailing him as the parent of oppression in every age and in every clime. He who is without the priceless asset of an opinion, and that yet richer possession, the courage of its expression, is unworthy of the heritage of our institutions.

This political anomaly, the United States of America, a sovereign nation, composed of forty-five states, themselves each qualifiedly sovereign, had its origin, like all other governments, in the wants and fears of men. That, too, was the origin of society. There is no fiction in the establishment of government, no poetry in the institution of society. They are simple human devices, overwatched by the divine, to protect the weak from the oppression of the strong, to save the good from the plunder of the bad, to square justice with all men, and to foster learning and religion.

The thirteen colonies, lying like a fallen arch along the Atlantic sea-board, each with its own civil polity, sometimes royal, sometimes charter, and sometimes proprietary, yet directed or authorized by the mother country three thousand miles away, had each for itself the wisdom and goodness necessary to righteous self-government, but they had not the arm of strength sufficient to achieve it, or the necessary power with which to maintain it. Out of this weakness and helplessness grew the Union of 1643 for protection against the Indians; that of 1765 to resist the Stamp Act; and the First Continental Congress of 1774 to protest against British oppression, and in 1776, by the Second Continental Congress, was declared that immortal Declaration of Independence, a new baptism of liberty for mankind.

The young Nation was under the feeble and loose control of the Continental Congress from 1776 until 1781, when the Articles of Confederation, proposed in 1777, were ratified by all the States. Under this league, or compact, a mere rope of sand, the new republic dragged its slow and tortuous way along until the Constitution of 1787 went into effect in 1789. In the meantime the people were working patiently and hopefully to perfect that highest consummation of mankind, a government equal to the emergencies of peace and war, of liberty and righteousness.

The Confederation was a dismal failure and a keen disappointment. It not only made no strong central government, but it weakened the individual States as well. It could propose all things, but could do nothing. It could vote money, but could not raise it; could levy war, but could not maintain it. Washington said the nation was one today and thirteen tomorrow. It commanded no respect among the nations of the earth, and found no lodgment in the hearts of the people.

But the building of a nation is not the work of a day. It has been said that "a thousand years scarce serve to form a State." Slowly, but surely, the Hamiltons and Jeffersons, the Franklins and Madisons were preparing the people for that nation-building, that history-writing which should give a new birth to constitutional governments, and unfold to the human race a new and a higher destiny.

On the seventeenth day of September, 1787, the people of the United States, through their chosen representatives, adopted their Constitution, and put in concrete form that structure,

the foundation of which had been laid at Jamestown a century and three-quarters before, and which had come up through toil and strife, sacrifice and suffering, until it marked the loftiest heights which God had yet permitted unto His children.

It is not easy to define the constitution of a republic in fixed language. It is far more susceptible of illustration than of definition. It is certain that no set meaning can be correct, for no two constitutions are alike. But it is, in short, the peoples' limitation upon the authority of their servants. It marks the metes and bounds of their conduct. It is the "Thus far" of the sovereigns' mandate.

In the enacting clause of the Constitution, erroneously called the preamble, our forefathers set forth, with both strength and elegance, the purposes for which that instrument was ordained and established, which were (1) to form a more perfect Union; (2) to establish justice; (3) to insure domestic tranquillity; (4) to provide for the common defense; (5) to promote the general welfare, and (6) to secure the blessings of liberty to themselves and their posterity.

I have said that government is born of necessity, and it is plain that no one of these purposes could have been fully attained under the Confederation, or by the several States, else no necessity for a more stable civil government could have arisen.

Following the teachings of that great French scholar and publicist, Montesquieu, they separated and made coordinate the three great branches of government, legislative, executive, and judicial, making the lower, or popular branch, of the legislative immediately responsive to the people, and the upper, or State branch, representative of equal Statehood, as well as of the people; clothed the executive with strong administrative powers and qualified legislative negative, while they established an independent judiciary for the wise interpretation and the just application of the laws of the nation.

The Constitution was a grant of powers from the people to the federal government to do those things which the individual States could not do, or could not do well, while, at the same time it laid the proper limitations upon the powers thus conferred. It was the people's charter of nationality. It was the form of control they had adopted, the policy of government they had ordained. The peculiarities of its genius marked the

distinguishing characteristics of the people. It was the people's mandate as to duties enjoined, rights conferred, and wrongs prohibited.

But the powers conferred, the duties commanded, and the wrongs prohibited related to the United States as a nation, and were such as pertain to, and inhere in, a nationality, for the great bulk of the administration of justice, the enforcement of positive law, the punishment of crimes, the redress of private wrongs, and the protection of life, reputation and property had been left to the States, and by them justly and wisely administered.

In Article First of the Constitution, after elaborate provision for the exercise of legislative functions, the express powers of the Congress are enumerated in eighteen strong, clear and concise clauses, followed by eight clauses laying prohibitions upon its powers, which in turn are followed by three clauses, of greater length, placing interdictions upon the States, while the Tenth Amendment, adopted in 1791, says: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Then it is plain that the people of 1787, the nation-builders, intended to make a proper distribution of the powers of government so as to create on the one hand a sovereign nation, a democratic republic, equal to all the emergencies of a nationality, and, on the other hand, to preserve the autonomies of the original States, sovereign in those powers reserved to them, and yet subordinate to federal control in the exercise of those functions of government which are inherently national.

For a century and a quarter we have waged a mighty conflict of mind, and sometimes of arms, to determine where the powers of the States end, and those of the Nation commence, or where the functions of the Nation cease and those of the States begin, and the end is not yet. Like the poor, the champions of conflicting theories are ever with us. We have now, and ever have had, our strict constructionist and our loose constructionist, our conservative and our liberal, our States' rights advocate and our federalist devotee, each active and powerful in his day and in his way, sometimes moved by blind and unreasoning prejudice, sometimes misled by ignorance, but generally inspired by an honest motive and a fervid patriotism.

That we may understand more fully the powers with which our forefathers intended to clothe the Nation, and those which they intended to reserve to the States, let us take a brief retrospect of the country at the time of the adoption of the Constitution. There were thirteen States, each with an organized government, usually with three separate departments, each with acknowledged weaknesses; there was the Nation tottering under that mockery of a civil policy, the Articles of Confederation; domestic violence, internal strife, and Indian barbarities were always imminent; the total population of the country did not exceed four millions, scattered along the Atlantic coast from Maine to Georgia; there was not a mile of railroad to carry the travel and traffic of the people; there was nowhere on the high seas a steam-ship to carry the passengers through storm to port; not a mile of telegraph or telephone line to transmit mystic letters or carry the human voice; no wireless telegraphy to talk with ships on distant, heaving seas.

In that day of necessity, surrounded by environments that betokened nothing but evil to the infantile States, the people, through their Constitution, gave to the new Republic a complete charter of nationality. While they neither destroyed nor abandoned their State constitutions, they transferred sufficient power to the federal government to arm the Nation to meet the exigencies of its existence, to protect their liberties, and to promote their welfare. While they built for that day, with but a dim prophecy of the future, yet they built wiser than they knew, but had they foreseen the marvelous transformations of the succeeding century, that they would have, in a few ways, built differently is but the conclusions of logic and the teachings of reason. But they did build, not only a stable government, but a flexible and expansive government, one capable of indefinite development and increasing adaptation to the everchanging needs and recurring necessities of a progressive people.

That the Constitution was intended to be progressive in its application and use is apparent upon its own face. It provided a legislative department, but left the numbers composing it, and its mode of operation, as well as the pay of its members, to be determined by the necessities of the future as times and conditions changed; it provided an executive with limited tenure, but forever re-eligible, with unstipulated salary, and

with tremendous administrative discretion; it merely authorized a judiciary, with mode of appointment and tenure, out of which has grown the most delicate and complete system of administering justice in all history. Nowhere does it name cabinet officers or ministers of State, and only vaguely hints at heads of departments, yet from that single suggestion have grown nine great cabinet officers operating the mighty machinery of a rich and powerful government.

Constitutions are but the outlines of civil government. They cannot be made statutes of detail without the destruction of their efficacy and the loss of their dignity. They are but the seeds from which governemnts spring and grow and develop and mature.

Our Constitution grew out of progressive history. It was not a mere contract between the thirteen colonies. It was not only intended for the Nation of 1787, it was designed to guide the ark of the Republic for all times to come. That great jurist, Mr. Justice Story, said of it: "It was not intended to provide merely for the emergencies of a few years, but was to endure through a long lapse of ages, the events of which are locked up in the inscrutable purposes of Providence." The strength and vitality of the Constitution lie in its power to grow and furnish scope for the people's power and the Nation's necessities.

Happily for us, our forefathers put into the Constitution the elements of growth, and vitalized it with the spirit of progress, and I make bold to say that not a year has passed, from the day of its adoption to this, that it has not grown. But you ask me how can a written constitution grow? Its words are there not to be changed. Its commands and injunctions are inexorable. I do not, for a monment, contend that where the constitution expressly commands or forbids an act that its mandate can be qualified, modified, or enlarged, save by the solemn act of amendment as provided in the instrument itself, but I refer to that large and ever-increasing class of powers derived by implication from the express powers conferred by the Constitution.

There are five ways in which the Constitution may grow, or rather, there are five classes of powers that may be exercised under its authority; (1) the express powers conferred by the original Constitution; (2) the express powers contained in the amendments; (3) the powers expressly implied from the origi-

nal Constitution and its amendments; (4) powers not expressly implied, but upheld by the courts as implied powers; and (5) powers the necessity of which is so evident that nobody objects.

The express powers of the Constitution are not numerous, but are definite and well recognized. Nineteen amendments have been voted upon by the several States, fifteen of which have been ratified, the first ten as a Bill of Rights, the Eleventh to save the dignity of the States by relief from law suits by citizens of other States, the Twelfth to change the machinery of President-making, the Thirteenth to free the colored man, the Fourteenth to make him a citizen, and the Fifteenth to give him the ballot.

The construction and growth of the government under the first and second classes of powers, the original Constitution and its amendments, are too obvious to require comment, while the third class, powers expressly implied, have been mainly used in the organization and application of that governmental machinery by which the sway of authority is exercised and the act of obedience compelled. It is most fitly illustrated in the formation of the great departments and bureaus that constitute the arms of the government.

But it is under the fourth and fifth classes of powers that the Nation has had its vast and unparalleled growth, has risen like another Richilieu of might; under those powers, not clearly implied, but with which, for the interest of the Nation, for the good of the people, the Supreme Court has clothed the Constitution, and under the exercise of those powers inherent in government, those dormant forces awakened by necessity, those latent instruments of might that respond to the cry of man's extremities, which powers I call extra-constitutional, for nowhere in our fundamental law are they even hinted at, as no wisdom of man could foresee the necessity for their exercise.

It is generally conceded that the constitution of every nation is two-fold, there being one constitution of the government, and yet another of the Nation. The first is that frame-work, or machine of power, by which the control of men and agencies is effected, and may remain unchanged for long periods of time, while the second is the present, aggregate, and concurrent notion of the people as to the policy of government under the light, stress, and changes of an advancing civilization, and which may, in some channels, differ widely from the constitu-

tion of the government with which it was originally identical, which difference gives rise to amendments, constructions, implications, and other devices for the enlargement of powers.

Our constitution has grown under the hand of the Congress, of the Court, and of the Executive. Its growth began with its birth, and it has well-nigh, but not quite, kept pace with the march of the generations. If a power was necessary for government, and was neither expressly given nor clearly implied, then the wisdom of the Court must justify its implication. Alexander Hamilton, I think the greatest synthetic intellect of the ages, said: "If the power is necessary to the purposes of the Constitution it may be implied from powers expressed." I think he may rightly be called the discoverer of the great principle of implied powers, but it was left to John Marshall, the greatest legal mind of all time, to develop it. But how could powers be deduced from that principle? That question came forward and demanded answer just after the dawn of the government. A national bank was deemed to be a necessary means of carrying out the purposes of the constitution. No power was expressly conferred, or clearly implied in that instrument for the chartering of such an institution. But John Marshall, in that great storehouse of legal learning and governmental philosophy, the historic case of *McCullough versus Maryland*, called forth the implied powers of the constitution and made them subservient to the Nation's necessities. He reasoned that the people were the source of power; that they had made the constitution; that they had made it for the purposes of a nationality; that they had made it to promote their own welfare; that a national bank was a necessity to the financial and commercial well-being of the Nation, and that no blind adherence to empty form or sickly sentiment should stand in the way of the prosperity of the people or the happiness of their firesides. He declared that since all constitutional powers had come from the people that they were exercisable upon them and for their benefit. Said he: "The emergencies of the nation may require that the treasure raised in the North be transported to the South, or that raised in the East be conveyed to the West." A national bank was a convenient means to meet these exigencies of the Nation, and, therefore, the interest of the people required that the power to charter a national bank be deduced from the federal constitution.

The great Chief Justice proceeded upon the logical formula that in construing the Constitution the people were the major premise, the nation the minor premise, and a vital and flexible Constitution the conclusion. In this he was the great prophet of national life. He blew upon the Constitution the breath of life, vitalized its dullness, clothed its nakedness, and made it a living spirit, responsive to the recurring needs of an onward-going people.

Let me cite another instance of the growth of the Constitution under the magic touch that awakens implied powers. It was while the thunder of artillery roared and the battalions of blue and gray were marching in the horrid strife of civil war, when the people's coffers were empty and the Nation's treasury depleted, when the great question of the validity of the legal-tenders act came before our highest tribunal. No man, learned lawyer or simple layman, believed that the Constitution anywhere said that a rude paper-promise to pay money was money; then how could Treasury notes be made legal tender in payments of debts? Here, again, the court said that the Constitution was the handiwork of the people; that they had built the Nation; that the right to live implied the right to provide the means of life, and that the validity if the legal-tender act could be implied from any distinct provision of the Constitution, or from them all together.

Space forbids me to speak of the Insular cases, the extension of constitutional and extra-constitutional powers to far-distant islands of the seas, and numerous other decisions, by which the court has unfolded the Constitution like a mighty scroll, and made it cover the far-reaching and ever-changing interests of the American people.

And the Congress has added its tremendous weight and used its prodigious powers to further the work of enlargement and expansion of federal powers. It has embarked in activities undreamed of by the fathers. With that restless spirit of conquest and ambition for enterprise which suffers no restraint, it has added to the national domain the glittering islands of the seas, yet nowhere in the Constitution is there a hint of authority to acquire non-contiguous territory.

A few years ago Congress sent ship loads of provisions to the starving people of Ireland, a British possession; some years later it sent \$200,000 to the earthquake-stricken people of the

island of Martinique, a French possession in the Atlantic seas; a little later it went on a similar errand to the horror-smitten island of Jamaica. These are but a few of the missions of humanity upon which the Congress has gone, yet these ministrations have been made without a scintilla of constitutional authority, save that implied license to the nation to do good to all men. To these several acts of mercy not the least objection was made by the Congress of the country, and I have placed the authority for their performance under the fifth class of powers, as acts too righteous to be questioned, and will only add that our forefathers might have given as a justification of such acts a seventh purpose of the Constitution, to-wit, "the relief of distressed humanity."

But the most striking of all examples of extra-constitutional authority is just now before us. I allude to that most marvellous feat of all history, the construction of the Panama Canal, by which the two oceans are to be joined in everlasting wedlock. Not only is this stupendous national enterprise without constitutional authority, but is being constructed on non-contiguous territory, thousands of miles from home. Yet no objection has been heard, in Congress or out, save as to method only, a conspicuous illustration of my contention that whatever the nation finds it necessary to do it will find authority for doing.

Nor has the Executive been idle. Nor has it always walked in the narrow way of the expressed, or easily implied Constitution. In 1794, Washington sent federal troops to Pennsylvania to suppress the Whiskey Rebellion without the necessary request of either the legislative or the executive of that State, and without the constitutional requirements to warrant such use of the national soldiery. Just a hundred years later, in 1894, Grover Cleveland sent a detachment of the United States army to Chicago to suppress a riot, not only without the required constitutional request of the legislature of Illinois or the Governor of that State, but against the earnest protest of the latter. It is said that a mail car was attached to the train that bore the troops, but they went for a much broader and higher purpose than the protection of the mails, that of protecting the life and property of a great city. Yet, in each instance, the federal interference was justified on the ground that

the peace and tranquility of other portions of the country were involved in the disorders of these disturbed centers.

President Lincoln neither had, nor claimed to have, the slightest warrant in the Constitution for the issuance of the Emancipation Proclamation, save the necessities of war and the exigencies of the Nation in its struggle for existence. In neither of the instances here given was the President a usurper or a tyrant, but in each instance was he a wise and patriotic ruler, with the oath of office warm upon his lips, determined both to preserve the Constitution and to protect the people.

But the resort to implied powers must never be made the excuse for usurpation, for that has ever been the customary weapon for the destruction of free governments. If the new and heretofore unused power cannot be implied in reason and justice, without violence to the Constitution, the people's grant of authority, then we must invoke the right of amendment, and confer that power in the way which the organic law has prescribed for its own enlargement.

Then what shall the Nation do, and what shall the States not do; or what shall the States do, and what shall the Nation not do, under the implied powers of the Constitution? That both the Nation and the States must be preserved, we are all agreed; that each affords us protection and advances our welfare, we cheerfully admit. To doubt the perpetuity of either, or to advance the one at the expense of the other, is to be unfaithful to our institutions. To find that true poise and balance of power by which the people are best protected in all their rights and interests, is the first inquiry of every true citizen of the Republic.

The integrity of the States will be preserved; their established constitutions and governments will stand; their lines and boundaries will not be broken; their administrative functions may be changed; but they will not be impaired; their internal policy will not be interfered with; the administration of the great bulk of positive law will be, as now, in their hands; their schools, their charities, their public institutions, their elections, in short, those fundamentals of sovereignty admittedly and constitutionally theirs, will remain, but I do not hesitate to say that there are powers now so feebly and inefficiently used by the States, and many others yet in the people not delegated, that must be lodged with the Nation, if with us justice and liberty are to abide.

Do not misunderstand me. While I am a follower of Hamilton, I am yet a lover of Jefferson, and when federalism means power for justice and liberty, I love it with all my heart, but when it means power for oppression, I hate it with a relentless hatred; while for States' rights, when it means the right of a State to live and grow and develop and be free, I have the warmest affection, but when it means a blind following after a dead and empty past I have for it nothing but mingled pity and contempt.

Such is today the complexity of our national life that the government must not only be wise and just, but strong, vigorous, and easy of application. With a population of eighty-five millions; with a million of immigrants, of every nation and of every tongue, annually crowding our shores; with vast wealth and untold riches; with varied and teeming industries; with a commerce the wonder of the world; with two hundred and twenty thousand miles of railroad, spanning the continent and binding the States into a vast lace-work; with seventy millions of messages annually passing over our fourteen hundred thousand miles of telegraph lines; with more than four million telephone instruments in daily use; and with wireless telegraphy carrying winged speech over the curved and misty seas; with these, all these, it is not strange if our eyes are lifted beyond the confines of our own State, and we compass the far-off limits of the nation itself!

In the midst of such a life, complex, varied, complicated, almost giddy and whirling, our course is plain. While we must cherish the States, develop their laws, and obey them, with an increasing pride in local institutions, we must yet look to the nation, and make it, as we surely can make it, freer and more powerful for good. To that end the Constitution was made, and we must remember that it was made for us, and not we for it.

In those vast repositories of implied powers, five words in the enacting clause called the general welfare clause, and seven words in the third clause of the eighth section, of Article one, called the inter-State commerce clause, and in other sources of implied powers in the Constitution, we shall find ample authority for such laws as will overcome the evils that beset us and promote the good which we would attain.

The great railway corporations, carrying inter-State travel

and traffic, have already fallen under the regulatory and supervisory control of the federal government, and these laws must be strengthened and improved until their capacity for evil is minimized and their powers for good developed. Fictitious capitalization, excessive rates, rebates, unfair discriminations, and unsafe accommodations are among the evils to be remedied. Such enterprises have an unquestioned right to live and prosper, and while their evils are repressed and punished, their rights should be as jealously guarded as those of individuals. We may well hope that just laws of control, wisely and firmly administered, heedful alike of the rights of property on the one hand, and of the public on the other, with like laws for intra-State lines, will bring these utilities and the public into such well-defined relations as will conduce, not only to the prosperity of each, but to their peace and happiness as well.

Those vast aggregations of wealth, the great insurance corporations, chartered in the different States, and located mainly in our rich and populous cities, with branches in every portion of the country, some of them even international in their scope, should, in the interest of the people be made the subject of wise control and rigid supervision by the national authority. While their beneficent purpose is readily conceded, the saving of the helpless from the losses of death, disease and casualty, yet recent disclosures have shown how potent a factor for evil they may be by the oppression of exorbitant rates, wasted incomes, and undue interference with political organizations. Since they are nourished by the people, the bulk of them purporting to be mutual in benefits and profits, it is but just and reasonable that they should respond to public supervision.

Other great corporations, inter-State in their operations, whether organized for communication, transportation, manufacturing, mining, or whatever purpose, should be taken under federal control, and, in justice and firmness, should have exposed to the public their real investments, their true profits, their modes of business, while, above all, there should be preserved to each, whether large or small, that right of honest competition, or decent rivalry, so essential to the welfare of a thrifty and progressive community. Commencing with the Sherman anti-trust law of 1890, we have made great progress along that line, adding the anti-rebate law, the railway rate law and many others, besides a better enforcement of existing

laws, but much yet remains to be done before we can truthfully say that each and every man, each and every corporation, great and small, has a just and equal chance in the race of life.

But recent events of an international character, have brought to the public attention the necessity of enlarged national jurisdiction in a new and highly interesting field. I refer to the disturbed diplomatic relations between the United States and the empire of Japan. The treaty-making power is in the Nation, rights growing out of treaties are cognizable in the federal courts, yet conditions, both civil and criminal, may arise, because of the relation of the States to the Nation, which may prevent the fulfilment of our treaty obligations to other nations.

By the provisions of our treaty of 1894 with the Japanese nation, the citizens or subjects of each of the high contracting parties, when traveling or residing in the territory of the other high contracting party, shall enjoy the "same privileges, liberties and rights" as do the citizens or subjects of that country, which carries with it the right of Japanese children resident in this country to enter our free public schools. Under the authority of a State law, the School Board of the city of San Francisco refused the admittance of such children, and Japan protested. As a matter of policy, I think the people of California were eminently correct, for I am opposed to the admission of either Negro, Chinese, or Japanese children to the schools for white children, yet it placed the United States in the embarrassing attitude of being unable to enforce the obligations of one of its solemn treaties. This is not the first time that we have been face to face with this difficulty. In 1851, a mob destroyed the Spanish consulate in New Orleans. The United States acknowledged its responsibility, made reparation, and saluted the ship that bore away the retiring consul, but claimed that it had no jurisdiction to punish the wrong-doer. In 1891, a mob broke into the jail in the same city, and killed three Italian subjects. Italy at once demanded indemnity and assurance that the offenders would be punished. The United States promptly paid the indemnity, and promised to urge the State of Louisiana to bring the guilty parties to justice but was compelled to admit its own lack of jurisdiction to punish the murderers. Italy remonstrated, and war was narrowly averted.

It is essential to the peace and the credit of the Nation that it be both willing and able to enforce every jot and tittle of its treaty obligations with the nations of the earth, and to meet that necessity the time has come when the dignity and honor of the Republic demand that the Congress shall make, not only all civil matters that may arise, but all crimes that are committed against the treaty rights of foreigners domiciled in the United States cognizable in the federal courts.

The evils of child-labor, the day sweat and the night toil of tender and helpless little ones, ready only for the mother's kiss and the father's embrace and the school's molding touch, has well-nigh become a national disgrace, and while I cherish the hope that the States may yet be wise in their day and rise to the duty of the hour, yet if they do not hasten to lift this burden, the heart of the Nation will take it up and echo it back and forth until some sleeping constitutional power will be awakened, and the Congress, in response to the demand of the Nation, will become not only the protector, but the savior of little children.

The increase of divorces, the ease with which they are obtained, the widely divergent laws of the different States, and the consequent scandal and disturbance of the marital relations will ere long knock at the door of the nation and demand an uniform divorce law. Upon the sanctity of marriage, the fidelity of husband and wife, the legitimacy of children, and the making of homes depend not only the safety, but the very life of the Republic itself. Yet it is not infrequent that husband or wife, for some trivial and unscriptural reason, leaves the marital roof for some State whose divorce laws are but a name, obtains a divorce, and returns to marry the wretch whose insidious lust had already despoiled a home. Or, what is worse, a legislature is seduced into granting a private divorce under the guise of a general law. More deplorable still is the fact that some of the States of the Union now have no laws prohibiting the intermarriage of the black and the white races. I believe that the only way to preserve the purity of the Anglo-Saxon race and the sanctity of the American home is to write the laws of marriage and divorce upon the statute books of the nation.

We are a decent people. We are a religious people. Despite the taint of commercialism, we yet worship at the shrine

of the living God. If any State shall tolerate a practice, or license a vice, offensive to the moral sense of the Nation, the outraged conscience of the people will demand its removal. It removed from the hands of the State of Louisiana a mighty State lottery, a huge gambling house that stood as a daily menace to the national morals; it drove from the territory of Utah the unholy institution of polygamy; it lifted from the Nation the curse of human slavery at the cry of the great North; not that their hands were clean, or their souls white, for they, like us, had sinned against high Heaven, and slavery perished because God was against it.

I have claimed, and I do now claim, that all these instrumentalities may be used to secure our material welfare, to protect our liberties, and to preserve our morals under that charter of our nationality, the federal Constitution. In asserting these views I have not sought to disparage the States, or to detract from their dignity and power. I have merely sought to call attention to the powers residing in the organic law of the Nation and point the way to their righteous use and application. Conscious that my views are not fully shared by those present, I call to my aid that great patron saint of the doctrine of strict construction, Thomas Jefferson, and you may be surprised to know that he took a more advanced position one hundred years ago than I have taken tonight. In his annual message to the Congress in 1806, referring to the excess of revenues arising from imposts, and the class of people who paid them, he said: "Their patriotism would certainly prefer its continuance and application to the great purposes of the public education, roads, rivers, canals, and such other objects of public improvement as may be thought proper to add to the constitutional enumeration of federal powers. By these operations new channels of communication will be opened between the States, the lines of separation will disappear, their interests will be identified, and their union be cemented by new and indissoluble ties." Hear these words, "the lines of separation will disappear." Mr. Elihu Root is said to have used similar language last year. Thomas Jefferson in 1806, and Elihu Root in 1906 talking of vanishing State lines! I am far less radical than either, for I have accorded to the original States all their pristine rights and powers, and only insisted that they make a wise and proper use of them lest the scepter pass from the

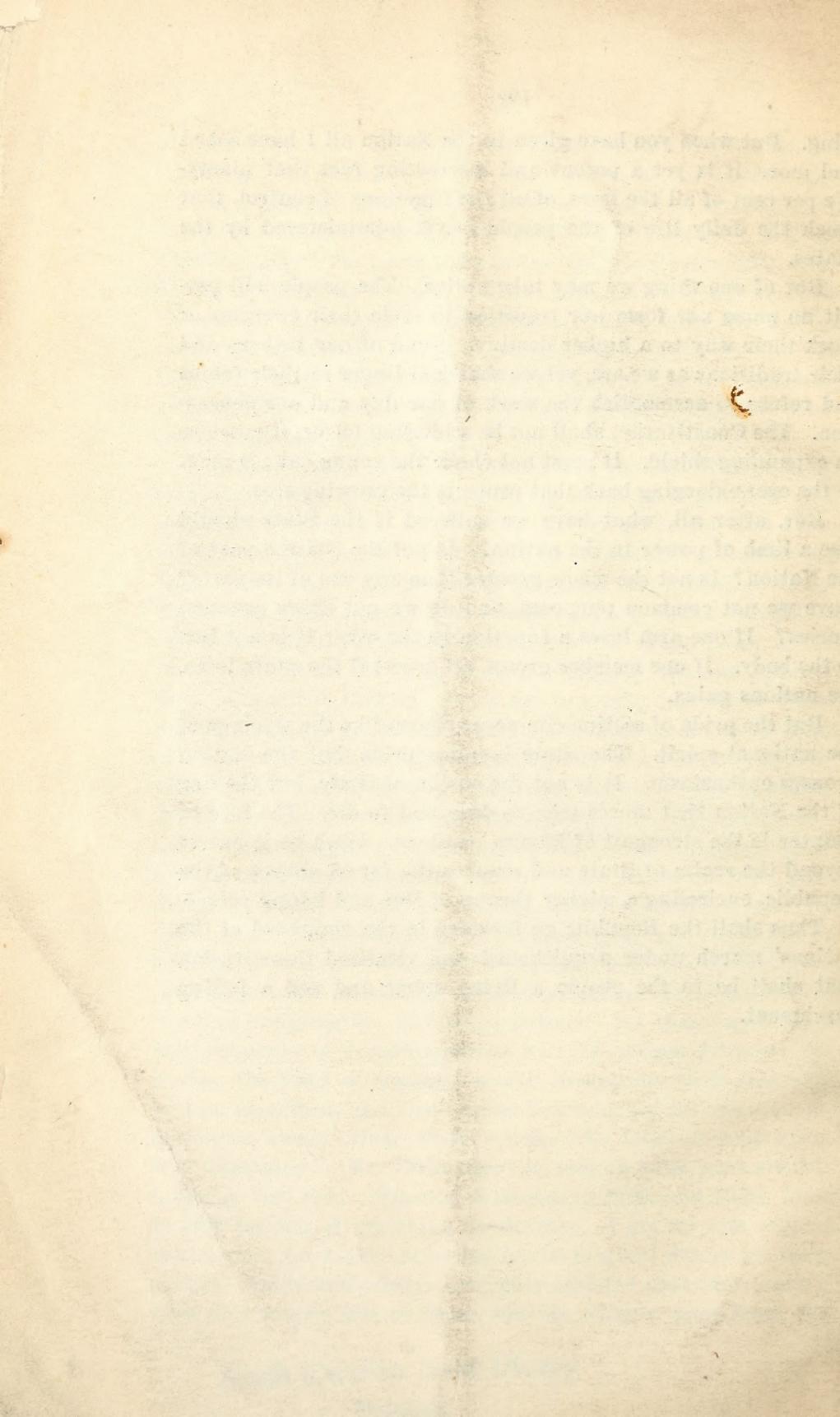
King. But when you have given to the Nation all I have asked and more, it is yet a potent and interesting fact that ninety-five per cent of all the laws, of all the functions of control, that touch the daily life of the people is yet administered by the States.

But of one thing we may take notice. The people will permit no name nor form nor tradition to stifle their energies or block their way to a higher destiny. Fond of our fathers and their traditions as we are, yet we shall not linger at their tombs and refuse to accomplish the work of our day and our generation. The Constitution shall not be a binding fetter, it must be an expanding shield. It must not choke the young oak; it must be the ever-enlarging bark that protects the growing tree.

But, after all, what have we suffered if the State should lose a limb of power to the nation? Is not the State a part of the Nation? Is not the whole greater than any one of its parts? Have we not common purposes, and do we not share common glories? If one arm loses a function to the other it is not lost to the body. If one member grows, all grow; if the State loses, the nations gains.

But the pride of section can never charm like the wooings of the national spirit. The State inspires pride, but the Nation arouses enthusiasm. It is not the ensign of State, but the flag of the Nation that moves men to dare and to die. The love of country is the strongest of human passions. With us it passes beyond the realm of State and reaches the far-off shores of the Republic, encircling a mighty throng of free and happy people.

Thus shall the Republic go forward in the vanguard of the nations' march under a quickened and vitalized Constitution that shall be to the people a living spirit and not a fading parchment.



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